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No. 90-1499

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

JAMES ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MAURICE S. THOMPSON, et al.,

Respondents.

# REPLY BRIEF OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## I. PETITIONERS HAVE NEITHER "VIOLATED" THE DECREE NOR THE CONSTITUTION IN EITHER THE ORIGINAL CONDEMNED ROW OR THE OTHER FACILITIES

Respondents contend that petitioners have violated the decree continuously since its entry and that therefore *Board of Education v. Dowell,* 498 U.S.__, 111 S.Ct 630, 112 L.Ed.2d 715 (1991), does not apply. They point to the district court's 1987 interpretation of the decree to apply throughout the prison, then characterize the differences between the East Block and Carson Section programs on the one hand, and the decree on the other, as "violations." They also imply that because the district court has not found petitioners in compliance in North Segregation, petitioners are also not complying in the original condemned row, the only unit to which the decree is actually addressed. *Thompson v. Enomoto,* 815 F.2d 1323, 1324 (9th Cir. 1987); "[t]he decree ordered the Warden to implement various changes in classification and daily routines in San Quentin's North Segregation unit." Finally, respondents charge that petitioners were found to have violated the Constitution in respect to East Block noise levels and law library access.

Much of this argument was anticipated and dealt with in the petition. As noted there, petitioners never agreed to apply the decree to Grade A inmates in units other than North Segregation. While they did not object in 1982 to the decree being extended, with modifications, to the Adjustment Center for Grade B inmates, they noted in support of their 1982 request for modification that the "provisions for Grade B inmates were negotiated in light of circumstances existing over a year ago in the original condemned row." Plaintiffs' Supplemental Excerpt of Record (PSER) at 6.

Petitioners thus agreed to extend the decree's high-security program to Grade Bs housed in the Adjustment

Center, where it was possible to comply. They did not, then or since, agree that the much different and far less secure Grade A program could or would apply in units other than North Segregation. And it was not until 1986-87 that the district court reversed the special master and decided that the decree did apply in those other units.

Because the district court expressly stated that the decision was interlocutory, petitioners did not appeal. The court of appeals' decision that petitioners waived their rights to challenge that order has insulated the district court's interpretation of the decree from review. Respondents now ask this Court not only to affirm that judgment, but to do so on the grounds that the district court's unreviewed decision about the scope of the decree meant, *ex post facto,* that the program in other units "violated" the decree over the years. They then urge the Court to view petitioners' failure to comply *after* the district court's 1987 decision as resulting in more "violations," despite the fact that the litigation since then has been about whether, and if so how, the decree's provisions should be applied in other units.

Even if, however, petitioners are to be forever bound by that decision, the fact remains that they have consistently complied with their promises in North Segregation[1/] and the Constitution in that and every other

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1. Respondents' assertion that petitioners have not complied in North Segregation is more than a little disingenuous. There have been a few minor problems over the years, to be expected in regard to an omnibus, and somewhat ambiguous, decree. But when the inmates moved for contempt in April, 1982, they did so in respect only to conditions for Grade Bs who were moved to the Adjustment Center, conceding that by then petitioners had complied in North Segregation. The minor problems since -- a 1983 dispute about getting inmates to the visiting room on time; a 1985 dispute about some missing pocket-parts in the unit law library; a 1986 dispute about whether inmates should be allowed computer typewriters -- were settled by negotiation. The 68 inmates in North Segregation did

unit.[2/] That is the foundation for this petition, and why

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not complain about compliance in 1987 or, until moved to East Block, in 1988, during which time the Monitor stood ready to investigate any complaints at their request. Nor have they complained since being moved back in the Fall of 1989. It is only because the inmates have not challenged compliance there that "no court has ever found petitioners in full compliance" in North Segregation. Opp. Cert. at 8.

2. Respondents represent that the Monitor found two "serious constitutional violations" in East Block, concerning noise and law library access. They then concede, as they must, that the noise abatement measures recommended by the Monitor have been implemented in East Block. Opp. Cert at 17 n. 6. They do not make clear, however, that those improvements were made *before* the condemned inmates were moved to East Block. Petitioners therefore appealed the noise abatement modification as lacking factual support, since the condemned inmates in East Block never suffered from intolerable noise. Defendants'-Appellants' Opening Brief at 40-41 n. 13.

The law library "finding" is ironic for two reasons. First, the decree provides for a unit library with specific case reporters and other texts. Not only were petitioners found to have been complying with those provisions, they were also found to have been allowing inmates physical access to the unit law library -- not required by the decree -- in addition to paging privileges. Second, condemned inmates in California have taxpayer financed counsel throughout not only their state appeals, but federal *habeas corpus* review as well. Coupled with the unit library for which they negotiated and their paging privileges from both the main prison library and the state library system, respondents have perhaps the best "access to the courts" of any inmates anywhere in the country. Petitioners, therefore, appealed the modification requiring that the inmates be given physical access to yet another library located off the unit. If the decree is vacated, however, and the inmates feel they have a cognizable claim to that library, they are free to pursue it administratively and, if need be, in a state or federal lawsuit.

Finally, the Monitor's conclusion that the Constitution requires petitioners to escort inmates to the other library was appealed to and affirmed without comment by the court of appeals. Defendant'-Appellants' Opening Brief at 40-41 n. 13. It is fairly encompassed by this petition, since if the Writ is granted and the decree ultimately vacated or modified in accordance with the

this Court's decision in *Board of Education v. Dowell,* is indistinguishable in principle from this case.

## II. PETITIONERS HAVE NOT "WAIVED" THEIR ELEVENTH AMENDMENT RIGHTS

In a somewhat contradictory vein, respondents contend, as they did in the court of appeals, that petitioners "waived" the Eleventh Amendment by entering into and *complying with* the decree. The appellate cases on which they rely, however, pre-date *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), in which this Court held, *id.* at 99 n. 8, that because the Eleventh Amendment is jurisdictional it could be raised for the first time on appeal. They also pre-date *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which concludes that California has not waived its Eleventh Amendment immunity. *Id.* at 241. Absent an express waiver by a state's legislature, state officials are not empowered to waive the Eleventh Amendment. *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 467-469 (1945).

Finally, both *Lelsz v. Kavanaugh,* 807 F.2d 1243 (5th Cir.), *reh'g. and reh'g. en banc denied,* 815 F.2d 1034, *cert. dismissed,* 484 U.S. 1057 (1987) and *Washington v. Penwell,* 701 F.2d 570 (9th Cir. 1983), hold that the Eleventh Amendment bars the enforcement of previously entered consent decree provisions. In *Penwell,* a decree provision was vacated because it exceeded the requirements set forth in *Bounds v. Smith,* 430 U.S. 817 (1977), for inmate access to the courts. In *Lelsz,* at 1253-1254, the court of

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appropriate constitutional standards, the law library order will perforce be vacated or subject to rehearing. It is premature, therefore, for respondents to represent that their "access to the courts" rights have been violated.

appeals squarely held that neither consent to entry of a decree nor compliance with its terms could be construed as an Eleventh Amendment waiver. If, as in *Lelsz*, entry and compliance cannot work a waiver in respect to decree provisions addressed to state law claims, it is difficult to see how a waiver can be found in regard to a provision -- or, as here, an entire decree -- which is addressed to no cognizable claim whatever or, at best, is an inappropriate remedy for a doubtful federal claim.

To the extent *Lelsz* and *Penwell*, however, conflict with the summary conclusion about Eleventh Amendment waiver reached in connection with a pendent state claim to attorney's fees, in *Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984), that conflict, since the "waiver" issue is fairly included within Question II, further reinforces the petition.

## III. THE DEFERENCE DUE STATE PRISON OFFICIALS REQUIRES THE COURTS TO ACCEPT MODFICATION PROPOSALS IF THEY COMPORT WITH FEDERAL LAW, NOT JUST WHEN THE OFFICIALS SATISFY AN ADDITIONAL TEST OF NECESSITY, "FLEXIBLE" OR OTHERWISE

Respondents argue that the district court, through the Monitor, applied a "flexible" standard for modification, examining each issue in light of the "specific facts and circumstances" shown in the record. They imply that the modification standard was routinely derived from Ninth Circuit case law, rather than the product of lengthy argument between the parties about what the law should be. They also represent that petitioners "presented absolutely no evidence to support their views," Opp. Cert. at 31-32, regarding the modifications they requested but which were rejected. From these premises, respondents ask this Court to conclude, apparently, that not only is there no need to review this case to determine if the district court exceeded its jurisdiction, but that the record

demonstrates sufficient deference was given petitioners' expertise by the district court.

If petitioners' challenge to the partial denial of their alternative motion to modify was merely about whether an established body of modification law had been erroneously applied, petitioners would agree that the Writ should not be granted as to Question III. The Question, however, is not about mere error. Rather, as set forth in the petition, it concerns whether, in an institutional reform case, a district court exceeds its discretionary authority if it refuses to accept a decree modification proposed by state prison officials which comports in all respects with federal law.

The issue here therefore is not only whether a "flexible" test should supplant the "grievous wrong" language from *Swift & Co.*, although petitioners submit that the court of appeals was no better than equivocal as to whether a "flexible" test is applicable to a *defendant's* modification motion. In addition, petitioners contend that *any* standard, regardless of label, that results in the denial of a request to operate a state prison in conformance with federal law but differently than set out in a decree, impermissibly sanctions district courts to exceed their subject matter jurisdiction.

A "flexible" approach to decree modification is certainly preferable to one which is "inflexible." But if the "grievous wrong" test is merely to be supplanted with a "quantum of necessity" test, *Kowzlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989)[3], all that may have been gained is the measure between near-certain failure and near-absolute uncertainty. Petitioners submit that under either approach, the burden of proof is shifted to the wrong party.

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3. The Monitor heavily relied on this case as establishing the standard to be applied to petitioners' alternative motion to modify. *See*, A-51, A-77-78.

Even if regarded as an improvement, a "flexible" approach to decree modification that results in denying to prison officials the flexibility *they* require to lawfully carry out their difficult responsibilities, still intrudes more than Article III allows into matters delegated to the states. That is especially so where, as here, prison officials approach the district court with a perfectly lawful set of proposals, only to have the court pick and choose among them according to its view of their "necessity."[4/]

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4. Respondents' assertion that petitioners "presented absolutely no evidence" to support modifications which were denied, is simply wrong. In regard to the yard roofs, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-70, petitioners submitted national weather service data to show that few days in the year would be so inclement as to require a roof, that the East Block yards are protected from the wind and rain in a way that is not true of the North Segregation yard, that the North Segregation roof had been easy and inexpensive to install and that East Block roofing might pose a security risk -- interfering with gun coverage -- and that therefore the design and construction, if possible at all, would be unjustifiably expensive as compared with the alleged benefits. *See,* Defendants'-Appellants' Opening Brief at 10-11, citing to the record.

In regard to the cell shelves, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-82 through A-83, petitioners showed that shelves were unnecessary because the cell-block renovation that took place in response to court orders in other cases had eliminated the cell flooding problem that had caused some inmates to complain in 1979-1980 that storage under their bunks was not secure. Petitioners also showed that, due to inmates having scavenged the shelves for metal weapons' material, security would require the design, manufacture and installation of stainless steel shelves at considerable expense. *See,* Defendants'-Appellants' Opening Brief at 10-11, citing to the record.

Finally, in regards the canteen items, Opp. Cert. at 32, citing the Monitor's Fourth Report at A-87 through A-88, petitioners presented detailed evidence of the security and management impact associated with housing a much larger condemned population in a less secure facility, and expert evidence of the security problem connected with each of the items. *See,* Defendants'-Appellants' Opening Brief at 12-14, citing to the record. Inexplicably, although the Monitor cited the same expert witness to support denying items to Grade B inmates,

This case therefore illustrates the compelling need for this Court not only to speak to the appropriate modification standard, but also to establish the outer boundaries of the discretion which must be applied to the "facts and circumstances," by those courts charged with the responsibility for supervising the implementation of institutional reform.

Where, as here, a court is asked to allow modifications that may lessen the plaintiffs' benefits but which still conform to the law, it should grant the request. A flexible test for modification, properly applied, is useful in deciding whether there is adequate justification to amend a decree when the plaintiffs contend that to do so will make an otherwise bad situation worse. By virtue of the fundamental tenets of federalism, however, such tests -- flexible or otherwise -- are inapposite to a request to merely make a good situation, in the plaintiffs' eyes, less good.

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A-89 n. 39 and 40, he ignored the expert's testimony regarding the security threat posed by the Grade A inmates' canteen items. A-87-A-88. His having ignored the evidence, however, does not mean, as respondents represent, that the evidence is not in the record.

## CONCLUSION

For these reasons, as well as those stated in the petition, petitioners respectfully submit that the Writ of Certiorari should be granted.

DATED: May 6, 1991

Respectfully submitted,

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